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2000

# Fred P. Adams v. First State Bank : Petition for Rehearing

Utah Supreme Court

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Jack L. Shoenhals; Attorney for Plaintiff-Respondent.

Ken Chamberlain; Olsen and Chamberlain; Attorneys for Defendant-Appellant.

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### Recommended Citation

Legal Brief, *Adams v. First State Bank*, No. 14281.00 (Utah Supreme Court, 2000).

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BRIGHAM YOUNG UNIVERSITY  
J. REUBEN CLARK LAW SCHOOL

IN THE SUPREME COURT OF THE STATE OF UTAH

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FRED P. ADAMS

:

CASE NO. 14281

Plaintiff-Respondent,

:

vs.

:

FIRST STATE BANK,

:

Defendant-Appellant.

:

-----oo0oo-----

RESPONDENT'S PETITION FOR REHEARING

-----oo0oo-----

APPEAL FROM THE JUDGMENT OF THE THIRD

JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

HONORABLE BRYANT H. CROFT, JUDGE

-----oo0oo-----

Jack L. Schoenhals  
721 Kearns Building  
Salt Lake City, Utah 84101

Attorney for Plaintiff-  
Respondent

Ken Chamberlain  
Olsen & Chamberlain  
76 South Main Street  
Richfield, Utah 84701

Attorneys for Defendant-  
Appellant

FILED

JUN - 9 1976

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

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FRED P. ADAMS : CASE NO. 14281

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Jack L. Schoenhals  
721 Kearns Building  
Salt Lake City, Utah 84101

Attorney for Plaintiff-  
Respondent

Ken Chamberlain  
Olsen & Chamberlain  
76 South Main Street  
Richfield, Utah 84701

Attorneys for Defendant-  
Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

-----oo0oo-----  
:  
FRED P. ADAMS,  
:  
Plaintiff-Respondent, CASE NO. 14281  
:  
vs.  
:  
FIRST STATE BANK,  
:  
Defendant-Appellant.  
:  
-----oo0oo-----

RESPONDENT'S PETITION FOR REHEARING

-----oo0oo-----  
STATEMENT OF THE KIND OF CASE

This is an action for the return of a boat, and personal property wrongfully taken and for damages for the wrongful taking and detention of the boat and personal property.

DISPOSITION IN LOWER COURT

The lower court granted plaintiff's Motion for Partial Summary Judgment, reserving all other issues not resolved by the Partial Summary Judgment.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the Summary Judgment.

### RELIEF SOUGHT ON REHEARING

Respondent moves for and seeks a rehearing on this case and a reversal of the decision of the appellate court, or in the alternative a modification of its decision and remand for trial.

### STATEMENT OF FACTS

Respondent's Brief previously filed with this Court contains a detailed statement of facts. Respondent will therefore set forth in this petition only a concise summary of the facts.

On or about June 6, 1974, the plaintiff-respondent, Fred P. Adams, hereinafter referred to as Adams, made a \$3,568.27 down payment on a boat to be manufactured for Adams. (Adams Deposition pg. 7)

On or about August 2, 1974, the defendant-appellant, First State Bank, hereinafter referred to as First State Bank, loaned \$5,900.00 to Deseret Manufacturing hereinafter referred to as Deseret. (Kunz Deposition pgs. 4-5)

As security for the loan, the First State Bank obtained, and on August 5, 1974, filed a Financing Statement listing several boats and several motors. The boats and motors

were of identical description and the only distinguishing characteristic on the Financing Statement was the serial number of each boat and motor. (R. 102)

The Financing Statement filed does not contain the serial number of the Adams boat but First State Bank claims that they made a mistake and the serial number DMFA0082M75L was supposed to be DMFA0082M74L.

The serial number of the motor in the Adams boat was listed on the Financing Statement but was shown to be installed in another boat. (R.102; and Kunz Deposition pg. 10, lines 2-10)

On August 14, 1974, Adams paid Deseret \$2,100.00 cash and obtained delivery of his boat. (Adams Deposition pg. 15) A few days later, pursuant to agreement, Adams paid the additional sum of \$6,500.00 to Deseret. (Adams Deposition pg. 31)

Deseret did not pay First State Bank on August 15, 1974, the due date of the note, (Kunz Deposition pg. 6) and a few weeks later, First State Bank authorized the officers of Deseret to take the Adams boat and deliver it to the First State Bank. (Kunz Deposition Pgs. 7-10)

The boat was taken from Adam's back yard by the officers of Deseret without notice or warning to Adams.



The Adams boat was brand new and had a wholesale value of approximately \$6,895.50. (See the wholesale value of an identical boat as shown on Exhibit D-5, attached to the Adams Deposition.) First State Bank was only entitled to approximately \$5,900.00, the face amount of the note, plus interest, if any.

Adams filed action against the First State Bank and others to obtain possession of the boat and for damages.

#### ARGUMENT

##### POINT I

THE APPELLATE COURT ERRED IN ITS UNDERSTANDING ASSUMPTION AND STATEMENT OF THE FACTS OF THIS CASE AND BASED ITS OPINION UPON THE MISTAKEN ASSUMPTION OF FACTS.

##### A

THE ADAMS BOAT WAS MANUFACTURED IN 1974, NOT 1975, AS STATED BY THE APPELLATE COURT.

The actual description on the Financing Statement (R 102) of the boat claimed to be the Adams boat is as follows:

"1975 Seaflite 2200 Offshore #DMFA0082M75L, engine 255 Waukesha #WLDVSL16-11824"

The written opinion of the appellate court added periods and dashes to the serial number and underscored 75 and 74 and stated:

"The underscored numerals indicate the year during which the boat was manufactured."

This statement and assumption is not accurate. The boats were all manufactured in 1974, not 1975; yet, all the serial numbers of the three identically described boats on the Financing Statement end with 75L. The Financing Statement was filed on August 5, 1974. (R 103) The boat was taken from Adams in 1974 and the Complaint of respondent was filed in 1974.

The appellate court based its decision upon the foregoing erroneous assumption of facts and stated:

"The trial court was in error in holding that the figures showing the year of manufacture invalidated the statement." (emphasis added)

B

THE SERIAL NUMBER OF THE MOTOR IN THE ADAMS BOAT WAS LISTED IN THE FINANCING STATEMENT AFTER THE SERIAL NUMBER OF ANOTHER BOAT.

The opinion of the appellate court states:

"The serial number and description of the engine in the boat is correctly stated in the document."

While the serial number of the Adams motor may have been listed in the Financing Statement, the deposition of Vernon Kunz, an officer of the First State Bank, makes it clear that the number of the motor was listed with the description of another boat altogether. (Kunz Deposition Pgs. 9-10)

The serial number was therefore not "correctly stated", it was listed but incorrectly attached to the description of another boat.

## POINT II

THE APPELLATE COURT'S DECISION CITES GENERAL STATEMENTS OF THE LAW TO SUPPORT ITS DECISION BUT THE GENERAL STATEMENTS CITED WERE NOT INTENDED TO COVER THE SPECIFICS OF THE CASE AT HAND.

The decision of the appellate court cites the article of Professor Boyce in the Utah Law Journal as support for its decision as follows:

"An excellent article by Professor Boyce is found in 1966 Utah Law Journal at page 52, wherein the law is set out and cases cited." (emphasis added)

A review of the article discloses that no cases are cited to support the portion of the article quoted in the appellate court's decision. In fact, the article does not address itself at all to the question of priority of interests in the event of a financing statement containing errors in description.

The Attorney General's opinion, cited in the article, was written in response to a request from the Secretary of State (Clyde Miller) as to the necessity of a specific description of property designated in the financing statement. The request was obviously made so that the Secretary of State would know whether or not it could accept financing statements for filing if they did not contain detailed specific descriptions. The opinion, dated April 8, 1966,

and signed by Attorney General Phil L. Hansen, did not cite the case of Yancey Brothers Co. vs. Dehco, Inc., 108 Ga. App. 875, 134 S.E. 2d 828 (1964), for obvious reasons. The Office of the Secretary of State does not adjudicate the validity of, or priority of, secured positions. It merely accepts for filing, documents, which on their face appear to meet the minimum requirements of the Utah Code.

The concluding sentence of the opinion makes it clear the Secretary of State can accept financing statements not containing serial numbers. It says:

"A serial number is not required but merely a general identification of the property subject to any security interest."

The appellate court in its opinion also cites the general statement of law found at 69 Am. Jur. Secured Transactions, Sec. 394. However, 69 Am. Jur. 2d Secured Transactions at Sec. 397, states:

#### "EFFECT OF ERRONEOUS DESCRIPTION

Under pre-Code law, an erroneous part of a description in a chattel mortgage generally did not invalidate the mortgage as against third persons, where the remaining elements of the description were sufficient to enable identification of the property intended to be covered. However, where the property was misdescribed and there was nothing remaining to show definitely what was intended to be covered, the description was insufficient as to third persons.

The above principles apply generally with respect to a filing under the Uniform Commercial Code. In this connection, it should be noted that a financing statement substantially complying with the requirements set forth for such statements is effective, even though it contains minor errors that are not seriously misleading. Under this provision, it has been held or indicated that a mistake in setting forth the serial number of any particular item of collateral would not invalidate the filing. This view overrules contrary decisions under pre-Code law. Furthermore, the omission of a date has also been held to be a minor error that was not seriously misleading. And an erroneous statement of the location of the collateral has been overlooked where a description of the location, or of the real estate involved, was not necessary to the filing."

This rule regarding financing statements is set forth in the Utah Code Annotated, Section 70A-9-403 (5) as follows:

"A financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading."

The landmark case of National Cash Register Co. v. Firestone & Co., Inc., 191 N E 2d 471 ( Mass. 1963), 1 UCC Rep. 460 held that a financing statement which described "all contents of luncheonette ..." also included the cash register on the premises.

In the case of Still Associates v. Murphy, 267 N.E. 2d 217 (Mass. 1971), the court found that because of the facts of that particular case, the financing statement did not contain a "seriously misleading error." It stated:

"(a) Financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading.' If we apply this provision

to the facts of this case consistently with 'the broad purposes of the act' (see *National Cash Register Co. v. Firestone & Co., Inc.*, supra, at p 261) we are led to conclude that the validity of the financing statement was not affected by the mistake in the last digit of the serial number."

One reason the 1 digit serial number was not misleading in the Still case was that there was only one 1968 Dodge 6 cyl. D-100 Pickup listed on the financing statement and in possession of the debtor and it could not have been mistaken for 2 or more vehicles of identical description. In addition, the serial number of the motor was not also erroneously listed.

In the case of Yancey Brothers Co. v. Dehco, Inc., 108 Ga. 875, 134 S E 2d 828 (1964), the court stated:

"Constructive Notice. The question of the sufficiency of the description in a recorded instrument to impart constructive notice is for the jury except in clear cases .... Merely stating an incorrect serial number will not vitiate the contract if the key is there... but, when the incorrect serial number is eliminated here, all that remains is the names of the parties... the date, and the fact that a No. 60 Caterpillar Scraper was one of the subjects of the instrument... this would not be sufficient to create a jury question as to constructive notice." (Emphasis added)

It is important to note that in the Yancey case there were two scrapers and a discrepancy in the description of one.

As a practical matter, in the case at hand, a party calling the Secretary of State's Office or examining the financing statement would have no reason to believe that the statement was intended to cover the Adams boat. Inasmuch as the serial numbers on the financing statement varied by only one digit themselves, an individual making inquiry would have

no reason to believe the Adams boat, with a one digit difference, was the subject of a security interest. To make matters worse, a person making inquiry would be further mislead by discovering that the motor serial number of the engine in the Adams boat did not correspond with the engine serial number listed after the claimed erroneous serial number of the Adams boat.

It must therefore be concluded that the rule of law (as expressed in the Utah Code Annotated, American Jurisprudence, and case law) provides that a financing statement which contains errors, which are "seriously misleading" does not give rise to a valid security interest superior to an innocent third party.

### POINT III

THE FINANCING STATEMENT FILED BY FIRST STATE BANK CONTAINS ERRORS WHICH ARE SERIOUSLY MISLEADING AND IT DOES NOT CREATE OR GIVE RISE TO CONSTRUCTIVE NOTICE TO ADAMS.

The memorandum decision of the Trial Judge (R 90) clearly establishes that the trial court concluded that the Financing Statement contained - at best - errors which were "seriously misleading". It states:

"1. That because the financial statement filed by the bank contained the description of three boats of like description and serial numbers that varied from each other by only one digit, the claimed erroneous serial number of plaintiff's boat included on that statement was a fatal defect sufficient to defeat the bank's security interest therein."

In the instant case, the memorandum decision of the trial court discloses that the trial court was not convinced the First State Bank even intended a security interest in the Adams boat. It refers to the "claimed erroneous serial number".

Although a serial number is not required in a financing statement; when the object described in the financing statement can only be differentiated or determined by a serial number; and there are several other items of identical description with serial numbers that differ by only one digit; a correct serial number is absolutely essential and an incorrect serial number will not give rise to a jury question as to constructive notice.

The Financing Statement in the case at hand contained a mistake in the serial number of the boat and the serial number of the motor was not listed with the boat in which First State Bank claims a security interest against Adams. The errors in the Financing Statement were "seriously misleading" and the trial court was correct in so finding.

#### POINT IV

THE DISPOSITION OF THE CASE BY THE APPELLANT COURT IS IN ERROR AND EVEN IF THE APPELLANT COURT DOES NOT REVERSE ITS DECISION, IT MUST REMAND THE CASE FOR TRIAL ON SEVERAL ISSUES.

The Complaint of the plaintiff Adams contains several causes of action against a number of defendants. The only issue decided by the trial court when it awarded a Partial Summary Judgment to the plaintiff was the issue of whether



or not the Financing Statement was sufficient to create a question of fact as to constructive notice to Adams. When the trial court found that it did not, several other matters were disposed of automatically. If the appellate court reverses the decision of the trial court, then it must remand the case for trial on all issues raised in the pleadings, not just the "issues relating to the personal property other than the boat."

The trial court in its memorandum decision and partial Summary Judgment stated the following:

"2. Whether plaintiff Adams was a buyer in the ordinary course of business under Section 70A-0-307 and 70A-1-201 (9) remains an issue of fact as the record does not show clearly whether the \$2,100.00 paid by Adams to Nuffer & Tapp at the time the boat was delivered and the subsequent payment of \$6,500.00 were on the purchase of the boat or additional advances of credit to effect the transfer of the boat and whether the total or partial payment on the boat was by satisfaction of a money debt.

....

....

The issue of damages to plaintiff and all other issues relating to cross claims or counterclaims not resolved by the foregoing determination are reserved for trial."

A review of the Complaint of Adams establishes that there are three causes of action against various defendants and many issues remain to be tried even if the appellate court does not grant the petition for rehearing or reverse its decision. In addition, even if the First State Bank prevails; it is only entitled to the amount of its "lien", and Adams is entitled to the balance of the value of the boat.

### CONCLUSION

1. The appellate court misunderstood the facts of this case when it rendered its initial decision filed May 24, 1976 and it should therefore grant a rehearing and reverse its decision and affirm the decision of the trial court.

2. Research sources including cases, support the decision of the trial court.

3. The Financing Statement contains errors which are "seriously misleading" and it does not create constructive notice to Adams or give rise to a jury question of constructive notice.

4. Even if the appellate court does not reverse its decision, it must modify its remand to provide for trial on all issues raised by the pleadings.

Respectfully submitted,

Jack L. Schoenhals  
721 Kearns Building  
Salt Lake City, Utah 84101

Attorney for Plaintiff-  
Respondent

CERTIFICATE OF MAILING

I certify that on the 9th day of June, 1976,  
I mailed two (2) copies of the foregoing Respondent's  
Petition for Rehearing to Mr. Ken Chamberlain, Olsen &  
Chamberlain, 76 South Main Street, Richfield, Utah 84701,  
U.S. Mail, Postage Prepaid.

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Jack L. Schoenhals